# Che Minah bt Remeli v Pentadbir Tanah, Pejabat Tanah Besut, Terengganu & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO T-01–12 OF 2006
ZALEHA ZAHARI, ABDUL MALIK ISHAK AND ABU SAMAH JJCA
15 FEBRUARY 2008

*Civil Procedure — Judge — Application to recuse judge — Apprehension of bias — Oral application to recuse judges — Whether appellant entitled to have panel of judges who were non-Muslim to hear appeal — Whether there was a real danger of bias if judges of Islamic faith were to hear appeal — Whether appellant's conduct amounted to shopping for judges*

*Civil Procedure — Judge — Disqualification — Presumption of impartiality of a judge — Burden of proof — Onus of demonstrating bias lies with person who alleged it — Circumstances and situations justifying disqualification of judge*

When the appellant's appeal against the High Court's decision in dismissing her application for leave to commence committal proceedings against the alleged contemnors was called up for hearing on 19 September 2007, the appellant's counsel sought an adjournment to enable him to file a formal application for the appeal to be fixed for hearing before a panel of judges who were not of the Islamic faith. The Court of Appeal rejected the adjournment application and the appellant's counsel proceeded to make an oral application to recuse members of the Court of Appeal's panel from hearing the appeal. According to the appellant's counsel, as Terengganu Islamic Council had issued a fatwa stating that the teachings of the appellant's husband, one Ariffin Mohamad (also known as Ayah Pin) were deviant, the appellant was concerned that Muslim judges would adopt a personal stance in line of the 'Amal Maaruf Nahi Mungkar' (ie to encourage good and avoid sin) principle against her. Reference was also made to a statement allegedly made by the then Chief Justice that the common law should be replaced by Islamic law.

**Held**, dismissing the oral application to recuse:

(1) (per **Zaleha Zahari JCA**) It is not open for litigants to dictate the religious faith of the judges who should be empanelled to hear a particular appeal. In a multi-racial, multi religious society like ours,

parties must be prepared to accept the panel of judges before whom the case is listed, whoever they may be, a mixed panel of differing religious faith, a wholly non-muslim panel as well as an all Muslim panel. To allow such an application would be to create a dangerous precedent. Such conduct may also be considered as shopping for judges which should not, cannot and must not be encouraged (see paras 3 & 7).

(2) (per **Zaleha Zahari JCA**) Whether or not a judge ought to recuse herself/himself from hearing any case must necessarily be decided on its own facts. The question to be decided was whether there was a real danger of bias if judges of the Islamic faith were to hear the appeal. Even if one were to accept that there was in existence the fatwa referred to by the appellant's counsel, and the statement allegedly made by the then Chief Justice, they both had no relevance whatsoever in the consideration of the issue for determination in the appeal (see paras 8 & 10).

(3) (per **Abdul Malik Ishak JCA**) It was an acceptable proposition to say that a judge's impartiality is presumed and any party seeking disqualification must establish the circumstances and situations to justify the disqualification of the judge. There is a strong presumption of judicial impartiality. The standard of reasonable apprehension of bias must necessarily refer to an apprehension based on serious grounds. Each case must therefore be examined contextually and the inquiry would be based entirely on the facts. The appeal related to the question of leave and the issue on the fatwa (edict) and its ramifications had no role to play at all (para 27(a) & (b)).

(4) (per **Abdul Malik Ishak JCA**) On the facts, there was no suggestion that members of this panel were consciously allowing extraneous influences to affect their minds in adjudicating the appeal. There was no proof of actual bias against members of this panel and the appellant would find it very difficult to prove it even if she attempted to do so. It was appropriate to state that the relevant question to pose was not whether there was, in fact, either a conscious or an unconscious bias on their part but rather the crucial question to ask was whether a reasonable person properly informed would apprehend that there was such a bias. That reasonable person must understand that as the King's judges, the judge's impartiality was presumed and there were no circumstances and situations to justify the disqualification of members of the panel from hearing the appeal. No litigant can shop for judges of their own choice in this country (paras 29 & 34).

(5) (per **Abdul Malik Ishak JCA**) The presumption of impartiality of a judge must be upheld. It is the cornerstone of the judiciary. No one should carelessly argue that a particular judge is bias because the credibility of the judge depends on the presumption of his impartiality.

And that presumption is deeply rooted in our legal system. That being the case, the burden is on the party arguing for a disqualification to establish that the circumstances justify the finding that the judge must be disqualified. The onus of demonstrating bias lies with the person who is alleging that it is so (see para 35).

(6) (per **Abdul Malik Ishak JCA**) It is significant to note that any allegation of reasonable apprehension of bias would bring into sharp focus and would call into question not only the personal integrity of the judge but also the integrity of the entire administration of justice. It was advisable that any counsel who proposed to embark on this perilous course of action must be certain lest he ran foul of the law and be cited for contempt (see para 37).

**[Bahasa Malaysia summary**

Apabila rayuan perayu terhadap keputusan Mahkamah Tinggi yang menolak permohonan perayu untuk kebenaran bagi memulakan prosiding komital terhadap penghina-penghina seperti yang didakwa, telah dipanggil untuk pendengaran pada 19 September 2007, peguam cara perayu telah memohon penangguhan bagi membolehkannya untuk memfailkan permohonan rasmi bagi rayuan yang telah ditetapkan untuk pendengaran di hadapan panel hakim yang bukan beragama Islam. Mahkamah Rayuan telah menolak permohonan bagi penangguhan dan peguam cara perayu terus membuat permohonan secara lisan bagi ahli panel Mahkamah Rayuan menarik diri daripada mendengar rayuan tersebut. Menurut peguam cara perayu, memandangkan Majlis Agama Islam, Terengganu telah mengeluarkan fatwa yang menyatakan bahawa ajaran suami perayu, Ariffin Mohamad (juga dikenali sebagai Ayah Pin) telah menyimpang, perayu bimbang bahawa hakim yang beragama Islam akan menggunakan pendirian sendiri yang selaras dengan prinsip 'Amal Maaruf Nahi Mungkar' (iaitu menggalakkan kebaikan dan menghindari kemungkaran) terhadap perayu. Rujukan juga dibuat kepada kenyataan yang dikatakan dibuat oleh Ketua Hakim bahawa *common law* seharusnya digantikan dengan undang-undang Islam.

**Diputuskan**, menolak permohonan lisan untuk penarikan diri:

(1) (oleh **Zaleha Zahari HMR**) Adalah tidak terbuka kepada pihak-pihak litigan untuk menentukan pegangan agama hakim-hakim yang telah dipilih untuk mendengar satu-satu rayuan. Dalam masyarakat yang berbilang kaum dan agama seperti kita, pihak-pihak mestilah bersedia untuk menerima panel hakim sebelum kesnya disenaraikan, siapa saja

mereka, campuran ahli panel daripada pegangan agama yang berbeza, keseluruhan panel yang bukan Muslim begitu juga dengan panel yang kesemuanya Muslim. Dengan membenarkan permohonan tersebut akan mewujudkan duluan yang merbahaya. Tindakan tersebut boleh dikira sebagai memilih hakim yang semestinya tidak digalakkan (lihat perenggan 3 & 7).

(2) (oleh **Zaleha Zahari HMR**) Sama ada hakim seharusnya menarik diri mereka atau tidak daripada mendengar mana-mana kes, mestilah diputuskan atas faktanya sendiri. Persoalan yang perlu diputuskan adalah sama ada terdapat bahaya berat sebelah yang sebenar jika hakim-hakim yang beragama Islam yang mendengar rayuan tersebut. Walaupun, jika penerimaan bahawa wujudnya fatwa yang dirujuk oleh peguam cara perayu dan kenyataan yang didakwa telah dibuat oleh Ketua Hakim, kedua-duanya adalah tidak relevan langsung dalam mempertimbangkan isu untuk diputuskan dalam rayuan tersebut (lihat perenggan 8 & 10).

(3) (oleh **Abdul Malik Ishak HMR**) Adalah kenyataan yang boleh diterima untuk mengatakan bahawa keadilan hakim adalah dianggap dan mana-mana pihak yang memohon untuk penyingkiran mestilah membuktikan keadaan dan situasi untuk menjustifikasikan penyingkiran hakim tersebut. Terdapat anggapan kuat bagi kehakiman yang adil. Standard kebimbangan berat sebelah yang munasabah mestilah dirujuk kepada kebimbangan yang berdasarkan alasan yang serius. Setiap kes mestilah diteliti mengikut konteksnya dan siasatan mestilah berdasarkan keseluruhan fakta. Rayuan berkaitan dengan persoalan kebenaran dan isu berkaitan dengan fatwa dan kesan yang merumitkan tidak memainkan peranan langsung (lihat perenggan 27(a) & (b)).

(4) (oleh **Abdul Malik Ishak HMR**) Berdasarkan fakta, tidak terdapat cadangan bahawa ahli panel ini secara sedar membenarkan pengaruh luar untuk menjejaskan minda mereka dalam memutuskan rayuan tersebut. Tidak terdapat bukti berat sebelah yang sebenar terhadap ahli panel ini dan perayu mendapati adalah sungguh sukar untuk membuktikannya walaupun beliau cuba melakukannya. Adalah wajar menyatakan bahawa persoalan relevan yang ditunjukkan sama ada tidak terdapat, sama ada berat sebelah secara sedar atau tidak sedar di pihak mereka tetapi lebih kepada persoalan yang penting untuk ditanya sama ada seseorang berfikiran waras yang diberitahu secara betul akan memahami bahawa berat sebelah yang sedemikian. Seseorang yang berfikiran waras mestilah memahami bahawa sebagai hakim-hakim di bawah kuasa Raja, keadilan hakim adalah dijangkakan dan tidak terdapat keadaan dan situasi untuk menjustifikasikan penyingkiran ahli

panel daripada mendengar rayuan tersebut. Pihak-pihak litigan tidak boleh memilih hakim pilihan mereka di dalam negara ini (lihat perenggan 29 & 34).

(5) (oleh **Abdul Malik Ishak HMR**) Anggapan keadilan seseorang hakim mestilah didukung. Ianya adalah tunjang kehakiman. Tidak seorang pun seharusnya secara cuai mempersoalkan bahawa seseorang hakim adalah berat sebelah kerana kredibiliti hakim bergantung kepada anggapan keadilannya. Anggapan tersebut telah berakar tunjang di dalam sistem perundangan kita. Oleh itu, beban adalah ke atas pihak yang mempersoalkan bagi penyingkiran untuk membuktikan bahawa keadaan menjustifikasikan keputusan bahawa hakim tersebut mestilah disingkirkan. Tanggungjawab menunjukkan berat sebelah terletak kepada orang yang mendakwanya (lihat perenggan 35).

(6) (oleh **Abdul Malik Ishak HMR**) Adalah penting untuk diambil perhatian bahawa mana-mana dakwaan kebimbangan berat sebelah yang munasabah, akan membawa kepada fokus yang menjurus dan akan memanggil persoalan bukan hanya integriti peribadi hakim tetapi integriti keseluruhan pentadbiran keadilan. Adalah dinasihatkan bahawa mana-mana peguam yang mencadangkan untuk mengambil tindakan yang berbahaya ini mestilah pasti jangan sampai mencabuli undang-undang dan dikenakan penghinaan (lihat perenggan 37).]

**Notes**

For a case on application to recuse judge, see 2 *Mallal's Digest* (4th Ed, 2007 Reissue) paras 3748–3747.

For a case on disqualification of judge, see 2 *Mallal's Digest* (4th Ed, 2007 Reissue) paras 3754–3759.

**Cases referred to**

*Chunna Mal v Moolchand Ram* [1928] 55 IA 154 (refd)

*Committee for Justice and Liberty v National Energy Board* [1978] 1 SCR 369 (refd)

*Keshavlal v Pratap Singh* [1932] AB 168 (refd)

*Liteky v US* [1994] 114 S Ct 1147 (refd)

*Locabail (UK) Ltd v Bayfield Properties Ltd & Anor* [2000] 1 All ER 65; [2000] 2 WLR 87; [2000] QB 451 (refd)

*Majlis Perbandaran Pulau Pinang v Syarikat Berkerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 MLJ 1 (refd)

*Morris v Crown Office* [1970] 2 QB 114 (refd)

*Newfoundland Telephone Co v Newfoundland (Board of Commissioners of Public Utilities)* [1992] 1 SCR 623 (refd)

*R v Barnsley County Borough Licensing Justices, Ex parte Barnsley & District Licensed Victuallers' Association & Anor* [1960] 2 QB 167 (refd)

*R v Bertram* [1989] OJ No 2123 (refd)
*R v Bow Street Metropolitan Stipendiary Magistrate & Ors, Ex parte Pinochet Ugarte (No 2)* [2000] 1 AC 119 (dstd)
*R v Gough* [1993] AC 646 (refd)
*R v Morris* [1861–1873] All ER 484 (refd)
*R v S (RD)* [1997] 3 SCR 484 (refd)
*R v Smith & Whiteway Fisheries Ltd* (1994) 133 NSR (2d) 50 (refd)
*Ramanandi Kuer v Kalawati Kuer* [1928] 55 ILR 18 (refd)
*Secretary of State v Sarin* [1930] AL 364 (refd)
*State of Punjab v Hindustan Development Board* 1960 A Punj 585 (refd)
*State of West Bengal v BK Mondal and Sons* AIR 1962 SC 779 (refd)
*Superintendence Company of India (P) Ltd v Krishnan Murgai* AIR 1980 SC 1717 (refd)
*United States v Morgan* 313 US 409 [1941] (refd)
*The King v Sussex Justices, Ex parte McCarthy* [1924] 1 KB 256 (refd)
*Wrigglesworth v Wilson Anthony* [1964] MLJ 269 (refd)

**Legislation referred to**
Civil Law Act 1956 ss 3, 3(1)(a), 5

*Haris Ibrahim (Malik Imtiaz Sarwar with him) (Haris & Co) for the appellant.*
*Mohamad Sekeri Mamat (State Legal Adviser, Terengganu) for the respondent.*

**Zaleha Zahari JCA:**

**[1]** Consequential upon this court's decision to dismiss the appellant counsel's oral application to recuse members of this panel from hearing this appeal, counsel for the appellant, Encik Haris bin Mohamad Ibrahim, informed the court that he intends to lodge an appeal to the Federal Court against that decision. My reasons for dismissing the oral application to recuse are as follows:

**[2]** What transpired when this appeal was called for hearing on 19 September 2007 was this. The appellant's counsel informed the court that at case management stage before the registrar he had applied for this appeal to be fixed for hearing before a panel of non-Muslim Court of Appeal judges. As all of the members of this panel convened to hear the cases listed on that day (including this appeal) were all Muslims, he is seeking an adjournment to enable him to file a formal application for this appeal to be fixed for hearing before a panel of judges who are not of the Islamic faith. The appellant's counsel's objection is a general one, that of a class, ie all Court of Appeal judges of the Islamic faith. Alternatively, it may be construed as the

appellant's preferred choice as to the faith of the judges who should be empanelled to hear this appeal, ie, non-Muslim Court of Appeal judges. A

**[3]** The reason given for the adjournment is clearly without precedent. True, the court has a discretion to grant an adjournment, but the circumstances must warrant the exercise of such a discretion. I viewed the reason for the adjournment with great concern. Firstly, I am of the view that it was not open for litigants to dictate the religious faith of the judges who should be empanelled to hear a particular appeal. To allow an adjournment to enable such an application to be filed may be construed that such an application would be entertained. Such an attempt should, in my considered opinion, be nipped in the bud. The application for the adjournment was accordingly refused. B C

**[4]** After this ruling was made, the appellant's counsel did not proceed to present his submissions on the merits of the appeal. He then made an oral application to recuse members of this panel from proceeding to hear this appeal on the same ground, because the judges empanelled to hear this appeal are of the Islamic faith. He then informed the court that he would be referring to an affidavit which he intended to file in support of the formal application to recuse Court of Appeal judges of the Islamic faith from hearing this appeal had his initial application for an adjournment been allowed. D E

**[5]** To this development the position taken by this court was, that the case would be stood down to enable the appellant's counsel to file the affidavit which he intended to refer to, and the case be recalled after he had done so. We observed Encik Haris conferring with Encik Malik Imtiaz (who was appearing together with him), after which he informed the court that he was prepared to present his submissions as to why members of this panel should recuse themselves from hearing this appeal without reference to any affidavit. F G

**[6]** The reasons advanced as to why members of this panel should not hear this appeal were these. The appellant is the wife of Ariffin Mohamad (also known as 'Ayah Pin'). The appellant's apprehension of Muslim judges hearing this appeal arises from the fact that the Terengganu Islamic Council had issued a fatwa stating that Ayah Pin's teachings were deviant. The appellant is concerned that Muslim judges would adopt a personal stance in line with the *Amal Maaruf Nahi Mungkar* (ie to encourage good and avoid sin) principle. Reference was also made to a statement allegedly made by the then Chief Justice that common law should be replaced by Islamic law. H I

**[7]** The unanimous decision of the panel members that day was not to allow the oral application for recusal. On my part, the reason why I did not

recuse myself was this. Firstly, in a multi-racial, multi religious society like ours, parties must be prepared to accept the panel of judges before whom the case is listed, whoever they may be, a mixed panel of differing religious faith, a wholly non-Muslim panel, as well as, in this case, an all Muslim panel. To allow such an application would, in my view, be to create a dangerous precedent. Such conduct may also be considered as shopping for judges which should not, cannot and must not be encouraged.

**[8]** Secondly, whether or not a judge ought to recuse herself/himself from hearing any case must necessarily be decided on its own facts: The question here is, having regard to the facts and circumstances of the present appeal, was there a real danger of bias if members of judges of the Islamic faith were to hear this appeal? (See *Majlis Perbandaran Pulau Pinang v Syarikat Berkerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 MLJ 1).

**[9]** The subject matter under appeal relates to the question of leave to issue committal proceedings on the part of two officers of the Besut Land Office. The High Court judge had ruled that the failure to serve a sealed copy of order dated 21 June 2005 obtained ex parte on the officers concerned was fatal. The judge then refused to grant leave to the appellant to commence committal proceedings against the officers concerned. Hence this appeal.

**[10]** Thus, the issue for determination in this appeal is a limited one revolving on a procedural point. Even if one were to accept that there was in existence the fatwa referred to by the appellant's counsel, and the statement allegedly made by the then chief justice, I am of the considered opinion that they both have no relevance whatsoever in the consideration of the issue for determination in this appeal. Thus, to the question, 'Would a right thinking member of the public armed with material and relevant facts receive justice at the end of the hearing before a panel of Court of Appeal judges of the Muslim faith' on the procedural point in issue, must, in my view, receive a negative reply.

**[11]** The oral application to recuse was accordingly dismissed.

THE STAY APPLICATION

**[12]** The appellant's counsel was however insistent that the appeal not proceed for hearing on its merits that day. He then made an oral application for stay of the proceedings as he intends to file an appeal against the unanimous decision of this court's refusal of the oral application to recuse members of this panel from hearing this appeal to the Federal Court.

**[13]** This court clearly had, at that stage, a balancing act to play. On the one hand, the appellant was clearly not interested to have her appeal heard on its merits that day. There was also no real urgency as such for the matter under appeal to be disposed of that day. The committal proceedings was filed at the appellant's instance. If, as evident from the persistent stance of the appellant's counsel of not wanting a determinative ruling of the issue under appeal, the court's desire to dispose of all appeals listed, and cases not be adjourned except for good reason, may be misconstrued. In the event of the issue being ruled against the appellant, the court be accused of being in undue hurry to impose an unwanted decision against her.

**[14]** To accede to the request for stay however would mean that the appellant's counsel effectively would have obtained the adjournment that he had applied for in the first instance, and which had been refused by the court. That would, to a certain extent, undermine the authority of this court. Balancing these two factors, the considered and more prudent action to adopt was, it is better to sacrifice the latter over the former. The stay was allowed. The appeal was then adjourned.

**Abdul Malik Ishak JCA:**

INTRODUCTION

**[15]** The learned judge of the Kuala Terengganu High Court dismissed the appellant's application for leave to commence committal proceedings against the alleged contemnors. Aggrieved by that decision, the appellant lodges an appeal to the Court of Appeal. The appeal is now fixed before us.

**[16]** What appears to be an appeal in regard to the issue of leave has turned out to be an application by the appellant's counsel to recuse members of this panel from hearing the appeal. It is an unprecedented move. There is no formal application to recuse members of this panel and there is no affidavit in support. The application is initiated orally.

TO THE HEART OF THE MATTER

**[17]** Mr Haris bin Mohamed Ibrahim ('Mr Haris'), learned counsel for the appellant, submits that this appeal should not be heard by any judges belonging to the Islamic faith. He says that this request was communicated during case management in 2007 and, subsequently, by letter.

A Notwithstanding that he says that this coram has been constituted to hear the appeal.

**[18]** Mr Haris politely requests for an adjournment to enable him to file the formal application to recuse this panel from hearing the appeal. He says
B that he has been directed by the appellant, presumably to say what he is about to say to us by way of an oral submission. He says that it would be most appropriate if a formal application is made supported by the relevant affidavit so that the application for recusal will be fixed for hearing.

C **[19]** Mr Haris, again politely, suggests that perhaps this court may adjourn the session and hear the formal application of the appellant. He reiterates his suggestion, time and again. It is quite apparent that if this panel allows the adjournment, the same application for an adjournment would be advanced before another Muslim panel. Pure and simple, it is an appeal for leave to
D commence committal proceedings against the alleged contemnors and this court would not go beyond that. Mr Haris submits, without elaboration, that this panel should be concerned about the concerns of the appellant.

E **[20]** Coming to the rescue, Mr Malik Imtiaz Sarwar for the appellant submits along the following lines. That it is in the best interest for all concerned for the formal application to be heard. He submits that the underlying concern is that the State Authority of Terengganu has unlawfully demolished the structures on the appellant's land and such demolition
F constitutes an act of conspiracy between the various State Government officials. According to him, there is a fatwa (edict) that declares the appellant's husband's teachings as deviant.

**[21]** But, it must be borne in mind that the issue of fatwa (edict) has no
G relevance to the issue of leave.

**[22]** Mr Haris takes over the floor and requests for an adjournment on the ground that a Muslim panel should not hear the appeal. This court refused to allow the adjournment and directed that the hearing should proceed as
H scheduled. Again, Mr Haris seeks the permission of this panel to recuse ourselves.

**[23]** It is quite apparent that the appeal for leave to issue committal proceedings has been converted into an application to recuse the members of
I this panel.

**[24]** Undaunted, Mr Haris continues with his submission. He says that the appellant is the wife of Ariffin Mohamad — better known as Ayah Pin, the

former leader of the Sky Kingdom cult in Terengganu. He emphasises the gravity of the fatwa (edict) and the fears on the part of the appellant that Muslim judges would adopt a personal stance that the demolition of the structures on the appellant's land is in line with the principle of *Amal Maaruf Nahi Mungkar* (a principle to encourage good and avoid sin) which was the reason that was given for pulling down the structures in the first place. He says that the appellant is concerned that the fatwa (edict) would have an impact on good Muslims. He says that good Muslims will accept the demolition of the structures and that such demolition is in accord with the fatwa (edict). He says that the appellant is concerned about the recent statement by the Lord Chief Justice that the common law will be abolished and replaced by the Shariah law. According to him, in little Terengganu, a hamlet, the people there do read the newspapers. He expresses the concerns of the appellant in this way. That Muslim judges within the hierarchy of our judicial system would be obliged to comply with the fatwa (edict). He is apologetic when he says that he has not the slightest doubt that this panel is non-aligned. If that is the case, why is he seeking to disqualify this panel from hearing the appeal? In the same breath he says that the principle that justice must not only be done but be seen to be done should be put to the forefront. For these varied reasons, it is his submission that this panel should consider generously the concerns of the appellant and recuse ourselves.

**[25]** The oral application to recuse was dismissed. This court was constrained to hear the appeal for the reasons which are set out hereunder. Orally, Mr Haris then asked for a stay. This court adjourned briefly and finally granted the stay.

**[26]** The complaint of the appellant may be summarised in this way. The appellant is afraid that the Muslim judges in the Court of Appeal would be influenced by the fatwa (edict) and would, consequently, be bias and unfair in adjudicating the present appeal bearing in mind that the common law might be replaced by the Shariah law. The impartiality of all the judges in this country, irrespective of race or religion or gender, cannot be questioned. It is presumed. The fear is certainly unfounded. There is a strong presumption of judicial impartiality in this country. Our courts are still applying the common law of England and the rules of equity as administered in England on 7 April 1956 subject to such qualifications as the local circumstances render necessary by virtue of s 3(1)(a) of the Civil Law Act 1956 (Revised 1972) (Act 67)('the said Act'). The reception or application of English law to Malaysia is governed by the said Act. Section 3 of the said Act deals with the application of English law generally while s 5 of the said Act deals with the application of English mercantile law. Of course, the application of the English law via s 3 of the

said Act is qualified by the words 'save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia'. Similarly, s 5 of the said Act applies English law 'unless in any case other provision is or shall be made by any written law'. It is with these limitations in mind that our courts should look at the language of the relevant statute uninfluenced by English law upon the subject and interpret it accordingly (*Ramanandi Kuer v Kalawati Kuer* [1928] 55 ILR 18; *Secretary of State v Sarin* [1930] AL 364; *Keshavlal v Pratap Singh* [1932] AB 168; *State of West Bengal v BK Mondal and Sons* AIR 1962 SC 779; *Wrigglesworth v Wilson Anthony* [1964] MLJ 269; *Chunna Mal v Moolchand Ram* [1928] 55 IA 154; *State of Punjab v Hindustan Development Board* [1960] A Punj 585; and *Superintendence Company of India (P) Ltd v Krishnan Murgai* AIR 1980 SC 1717). Be that as it may, I subscribe to the proposition by Byles J, in *R v Morris* [1861–1873] All ER Rep 484, at p 486 that:

> ... it is a sound rule to construe a statute in conformity with the common law rather than against it, except where or so far as the statute is plainly intended to alter the course of the common law.

So, it is wrong to say that the common law will be abolished and replaced by the Shariah law. The fear is unfounded. Baseless. Common law still reign supreme in this country. It is still in vogue. Let it be known to all and sundry that the common law is here to stay.

ANALYSIS

**[27]** For my part, I am surprised at the oral application to disqualify this panel. It is a legally constituted panel. I must at the outset make the following germane observations:

(a) That public confidence in our judicial system is rooted in the fundamental belief that those judges, irrespective of race or religion or gender, who adjudicate the manifold cases must always do so without bias or prejudice and they must be perceived as such. It is an acceptable proposition to say that a judge's impartiality is presumed and any party seeking for a disqualification must establish the circumstances and situations to justify the disqualification of the judge. What is the criterion for disqualification? It is the reasonable apprehension of bias. Another pertinent question would be this. What would an informed, reasonable and right-minded person, viewing the whole matter realistically and practically conclude after having deliberated the matter? Yet, another pertinent question is this. Would that person think that it is more likely than not that the judge, whether consciously or unconsciously, decide the matter fairly? Fairness is the name of the

game. Once fairness is established, the application for disqualification or recusal would fall through. It would collapse like a deck of cards.

(b) There is a strong presumption of judicial impartiality. That being the case, the standard of reasonable apprehension of bias must necessarily refer to an apprehension based on serious grounds. Each case must therefore be examined contextually and the inquiry is based entirely on the facts. This panel is impartial. The appeal comes before this panel for the very first time. The appeal relates to the question of leave and the issue on the fatwa (edict) and its ramifications have no role to play at all.

(c) An allegation that the decision of this panel may be tainted by bias or by a reasonable apprehension of bias is a very serious matter. Such an allegation calls into question the impartiality of this panel and it raises doubt on the public's perception of the court's ability to dispense justice according to law. It is rather unfortunate that the serious allegations advanced by Mr Haris stands unaided by an affidavit.

**[28]** Be that as it may, I must categorically say that in adjudicating a case the judge must always keep an open mind. That would in essence be the meaning to be attached to the word 'impartiality'. It is impossible to determine the state of mind of a judge. The state of the judge's mind is as much a fact as the state of his indigestion. Cory J, in *Newfoundland Telephone Co v Newfoundland (Board of Commissioners of Public Utilities)* [1992] 1 SCR 623, at p 636 rightly said that it is obviously impossible to determine the precise state of mind of an adjudicator. The English Court of Appeal in *Locabail (UK) Ltd v Bayfield Properties Ltd & Anor* [2000] 1 All ER 65; [2000] 2 WLR 87; *Locabail (UK) Ltd and Another v Waldorf Investment Corporation & Ors*; *Timmins v Gormley* [2000] 2 WLR 870; *Williams v HM Inspector Of Taxes & Ors*; *R v Bristol Betting And Gaming Licensing Committee, Ex parte O'Callaghan* [2000] QB 451 with a coram of Lord Bingham of Cornhill CJ, Lord Woolf MR and Sir Richard Scott VC aptly said at p 472 of the report:

> The proof of actual bias is very difficult, because the law does not countenance the questioning of a judge about extraneous influences affecting his mind; and the policy of the common law is to protect litigants who can discharge the lesser burden of showing a real danger of bias without requiring them to show that such bias actually exists.

**[29]** There is no suggestion here that members of this panel are consciously allowing extraneous influences to affect our minds in adjudicating the appeal.

There is no proof of actual bias against members of this panel and the appellant will find it very difficult to prove it even if she attempts to do so.

**[30]** It is now opportune to articulate the meaning of the word 'bias'. It is often used interchangeably with the word 'prejudice'. In *R v Gough* [1993] AC 646 (HL), at p 665, quoting Devlin LJ in *R v Barnsley County Borough Licensing Justices, Ex parte Barnsley & District Licensed Victuallers' Association & Anor* [1960] 2 QB 167 (CA), Lord Goff aptly said that:

> Bias is or may be an unconscious thing and a man may honestly say that he was not actually biased and did not allow his interest to affect his mind, although, nevertheless, he may have allowed it unconsciously to do so. The matter must be determined upon the probabilities to be inferred from the circumstances in which the justices sit.

**[31]** In *Liteky v US* [1994] 114 S Ct 1147 at p 1155, Scalia J, defined the words 'bias' or 'prejudice' in this way:

> The words (bias or prejudice) connote a favourable or unfavourable disposition or opinion that is somehow wrongful or inappropriate, either because it is undeserved or because it rests upon knowledge that the subject ought not to possess (for example, a criminal juror who has been biased or prejudiced by receipt of inadmissible evidence concerning the defendant's prior criminal activities), or because it is excessive in degree (for example, a criminal juror who is so inflamed by properly admitted evidence of a defendant's prior criminal activities that he will vote guilty regardless of the facts).

**[32]** With respect, how could this panel be said to be biased towards the appellant when members of this panel have yet to hear the appeal proper. The English Court of Appeal in *Locabail (UK) Ltd v Bayfield Properties Ltd & Anor*; *Locabail (UK) Ltd & Anor v Waldorf Investment Corporation & Ors*;*Timmins v Gormley*;*Williams v HM Inspector Of Taxes & Ors*;*Regina v Bristol Betting And Gaming Licensing Committee, Ex parte O'Callaghan*, at p 487, rightly asked the following question:

> How can there be any real danger of bias, or any real apprehension or likelihood of bias, if the judge does not know of the facts that, in argument, are relied on as giving rise to the conflict of interest?

**[33]** How could members of this panel be disqualified from hearing the appeal based on the oral submissions of the learned counsel without the benefit of affidavit evidence? If the appellant's affidavit is filed accompanying

the formal application for the recusal, the learned State Legal Adviser of Terengganu, who is present, would be able to file an affidavit in reply. This panel would then benefit from reading these two affidavits. Another pertinent question to pose would be this. Would there be a reasonable apprehension of bias on our part after having heard the oral submissions of learned counsel as regards the appellant's perceived notions of bias? This brings to the forefront the criterion advanced by de Grandprê J in *Committee for Justice and Liberty v National Energy Board* [1978] 1 SCR 369, at p 394:

> … the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is 'what would an informed person, viewing the matter realistically and practically … and having thought the matter through … conclude. Would he think that it is more likely than not that (the decision-maker), whether consciously or unconsciously, would not decide fairly.

**[34]** As the King's judges, this panel acts in good faith and do not allow extraneous influences to affect our minds. This panel is also mindful of Lord Hewart CJ's aphorism that 'it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done' in *The King v Sussex Justices, Ex parte McCarthy* [1924] 1 KB 256, at p 259. Flowing from that, it is appropriate to state that the relevant question to pose is not whether there is in fact either a conscious or an unconscious bias on our part but rather, the crucial question to ask is whether a reasonable person properly informed would apprehend that there is such a bias. That reasonable person must understand that as the King's judges, the judge's impartiality is presumed and there are no circumstances and situations to justify the disqualification of members of this panel from hearing the appeal. No litigant can shop for judges of their own choice in this country. The fatwa (edict) that Ayah Pin's teachings were deviant was pronounced by the Terengganu Islamic Council Fatwa and Malay Customs Committee and as judges that apply the common law of England and the rules of equity as administered in England on 7 April 1956 this panel accepts it as one of the facts that surfaced pertaining to the oral application to disqualify ourselves. Speaking for myself, I must say that I have always been fair minded and my concern is to ensure that justice is not only done but must be seen to be done. I have always been fair to all litigants and I will continue to do so until I relinquish my cherished position upon retirement. I have this to say. That judges dispense justice according to the law. If the application to disqualify members of this panel is allowed for the reasons as advanced orally by learned counsel for the appellant, this would open the floodgates to other legal practitioners to choose judges in the Court

of Appeal to hear their cases in the near future. That should not happen and this panel will not allow it to happen and will not condone it.

**[35]** In the common law world over the past decade there is rooted in our legal system the fundamental belief that judges who adjudicate must always do so without bias or prejudice and it must be perceived to be so. It is a correct assertion to say and I so say that a judge must be impartial and it is his impartiality that forms the core attribute of the judiciary. The presumption of impartiality of a judge must be upheld. It is the cornerstone of the judiciary. No one should carelessly argue that a particular judge is bias because the credibility of the judge depends on the presumption of his impartiality. And that presumption is deeply rooted in our legal system. That being the case, the burden is on the party arguing for a disqualification to establish that the circumstances justify the finding that the judge must be disqualified. Put in another way, the onus of demonstrating bias lies with the person who is alleging that it is so. In *R v Smith & Whiteway Fisheries Ltd* (1994) 133 NSR (2d) 50 CA, at pp 60–61, the court observed that the reviewing courts have been hesitant to make a finding of bias or to perceive a reasonable apprehension of bias on the part of a judge, in the absence of convincing evidence to that effect.

**[36]** There is a passage that appears in the case of *United States v Morgan,* 313 US 409 [1941], at p 421 that merits reproduction. It is this. That judges 'are assumed to be people of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances'. This is food for thought for the appellant and her learned counsel.

**[37]** It is significant to note that any allegation of reasonable apprehension of bias would bring into sharp focus and would call into question not only the personal integrity of the judge but also the integrity of the entire administration of justice. It is advisable that any counsel who proposes to embark on this perilous course of action must be certain lest he runs foul of the law and be cited for contempt. Lord Denning MR in *Morris v Crown Office* [1970] 2 QB 114 at pp 122; [1970] 1 All ER 1079 at p 1081, gave this sound advice:

> The phrase 'contempt in the face of the court' has a quaint old-fashioned ring about it; but the importance of it is this: of all the places where law and order must be maintained, it is here in these courts. The course of justice must not be deflected or interfered with. Those who strike at it, strike at the very foundations of our society. To maintain law and order, the judges have, and must have, power at once to deal with those who offend against it. It is a great power — a power instantly to imprison a person without a trial — but it is a necessary power.

**[38]** However, where reasonable grounds exist to recuse a judge, counsel must be free to act fearlessly and raise the allegation in a polite manner. It must be remembered that this is a serious step that should not be undertaken lightly. A formal application must be filed supported by the relevant affidavits.

**[39]** If it can be established that there is a reasonable apprehension of bias then it may inevitably lead to the disqualification of the judge. It all depends on the facts of the case. When one says that there is no actual bias, it may mean that actual bias need not be established or it may mean that it is sufficient if there is a reasonable apprehension of bias. Since it is impossible to determine the precise state of mind of a judge then it can be argued that it is unwise or unrealistic to require the presence of actual bias.

**[40]** It may be argued that an unconscious bias may exist even where the judge is acting in good faith. Such a probability may be inferred from the circumstances of the case. And when a person says that there is no actual bias on the part of the judge, that person is conceding that the judge has acted in good faith and is not consciously relying on an inappropriate preconceptions. One must remember that 'there is an overriding public interest that there should be confidence in the integrity of the administration of justice' (per Lord Goff in *R v Gough* at p 659). Honesty and integrity go hand in hand and they are the two fundamentals which judges are presumed to have. They cannot be compromised.

**[41]** In reality, the criterion of disqualification is focussed on the judge's state of mind viewed from the objective perspective of the reasonable person. And the reasonable person is asked to imagine the decision-maker's state of mind.

**[42]** Another area of the law that impinges upon the judge's decision is the rule of automatic disqualification. It is derived from the speech of Lord Goff in *R v Gough*, at p 661, where His Lordship said:

> ... there are certain cases in which it has been considered that the circumstances are such that they must inevitably shake public confidence in the integrity of the administration of justice if the decision is to be allowed to stand … These cases arise where a person sitting in a judicial capacity has a pecuniary interest in the outcome of the proceedings … In such a case … not only is it irrelevant that there was in fact no bias on the part of the tribunal, but there is no question of investigating, from an objective point of view, whether there was any real likelihood of bias, or any reasonable suspicion of bias, on the facts of the particular

A case. The nature of the interest is such that public confidence in the administration of justice requires that the decision should not stand.

B **[43]** The House of Lords in *R v Bow Street Metropolitan Stipendiary Magistrate & Ors, ex parte Pinochet Ugarte (No 2)* [2000] 1 AC 119, revisited the rule of automatic disqualification. In that case, the House of Lords dealt with a situation in which Lord Hoffmann had participated in a decision where Amnesty International was an intervener, while sitting as a director and chairperson of a charity closely allied with Amnesty International and sharing its objects. In that context, it was found that the rule of 'automatic C disqualification' extended to a limited class of non-financial interests, where Lord Hoffmann has such a relevant interest in the subject matter of the case that he is effectively in the position of a party to the cause. Consequently, Lord Hoffmann was disqualified, and the decision of the House of Lords was set aside. Lord Browne-Wilkinson, writing a separate judgment for the House D of Lords, said at pp 132–133 of the report:

> 2 *Apparent bias*
>
> As I have said, Senator Pinochet does not allege that Lord Hoffmann was in fact biased. The contention is that there was a real danger or reasonable apprehension E or suspicion that Lord Hoffmann might have been biased, that is to say, it is alleged that there is an appearance of bias not actual bias.
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> The fundamental principle is that a man may not be a judge in his own cause. This principle, as developed by the courts, has two very similar but not identical F implications. First it may be applied literally: if a judge is in fact a party to the litigation or has a financial or proprietary interest in its outcome then he is indeed sitting as a judge in his own cause. In that case, the mere fact that he is a party to the action or has a financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification. The second application of the principle is where a judge is not a party to the suit and does not have a financial interest in its G outcome, but in some other way his conduct or behavior may give rise to a suspicion that he is not impartial, for example because of his friendship with a party. This second type of case is not strictly speaking an application of the principle that a man must not be judge in his own cause, since the judge will not normally be himself benefiting, but providing a benefit for another by failing to be H impartial.
>
> In my judgment, this case falls within the first category of case, viz where the judge is disqualified because he is a judge in his own cause. In such a case, once it is shown that the judge is himself a party to the cause, or has a relevant interest in its subject matter, he is disqualified without any investigation into whether there I was a likelihood or suspicion of bias. The mere fact of his interest is sufficient to disqualify him unless he has made sufficient disclosure: see Shetreet, *Judges on Trial* (1976), p 303; De Smith, Woolf and Jowell, *Judicial Review of Administrative Action* (5th Ed,1995), p 525. I will call this 'automatic disqualification'.

**[44]** Of course, the judgment of the House of Lords in *Pinochet* drew a lot of attention around the world and it provoked academicians to write a lot of articles on it. But that is the law.

**[45]** All these authorities are certainly thought provoking. The facts of the present appeal are no where near the case of *Pinochet*. Here, no one can suggest that members of this panel are bias. An objective reasonable person having full knowledge of the facts and context of the appeal at hand would not conclude that members of this panel have crossed the line so as to result in a reasonable apprehension of bias and of prejudgment.

**[46]** Hypothesis about how judges react where the issue of recusal is raised early, like the present case at hand, cannot be severed from the abundance of caution that guides many, if not most, judges at this early stage. This caution yields results that may or may not be dictated by the detached application of the standard of reasonable apprehension of bias. In this connection, it may well be that judges have recused themselves in the past in cases where it was, strictly speaking, not legally necessary to do so. Put differently, it can be argued that the fact that a judge would have recused himself or herself ex ante cannot be taken to be determinative of a reasonable apprehension of bias ex post facto.

**[47]** There is no need to reaffirm the well-settled principle of the impartiality of the courts of justice. This principle has been a matter of common knowledge across the common law world over the past decade or so. The fundamental belief that those who adjudicate must always do so without bias or prejudice has withstood the test of time. Cory J, in *R v S (RD)* [1997] 3 SCR 484, at para 106 quoted *R v Bertram* [1989] OJ No 2123 (QL) (HC) when defining bias or prejudice. That definition reads as follows (and I quote):

> a leaning, inclination, bent or predisposition towards one side or another or a particular result. In its application to legal proceedings, it represents a predisposition to decide an issue or cause in a certain way which does not leave the judicial mind which sways judgment and renders a judicial officer unable to exercise his or her functions impartially in a particular case.

**[48]** It is too premature to disqualify members of this panel at this point of time. There is no indication that members of this panel are not willing to hear the appeal with an open mind by being fair to all the parties. Members of this panel are aware that they must be fair and such awareness is consistent with the highest tradition of judicial impartiality.

A **[49]** My learned brother Abu Samah Nordin JCA has seen this judgment in draft and has expressed his concurrence with the reasons herein.

*Application dismissed.*

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Reported by Brendan Navin Siva

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